

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1504-CR

Cir. Ct. No. 2006CF651

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS O. ZARUBA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Thomas Zaruba appeals from a judgment convicting him of second-degree sexual assault of a child contrary to WIS. STAT.

§ 948.02(2) (2005-06)¹ and victim intimidation contrary to WIS. STAT. § 940.44(1) and from an order denying his motion to modify his sentence. Zaruba challenges the circuit court's exercise of sentencing discretion. Because the court properly exercised its discretion, we affirm.

¶2 Zaruba pled guilty to second-degree sexual assault of a child and victim intimidation. Four other second-degree sexual assault charges and an attempted second-degree sexual assault charge, all involving the same fourteen-year-old victim, were dismissed. The court imposed an eleven-year sentence for second-degree sexual assault (four and one-half years of initial incarceration and six and one-half years of extended supervision) and a nine-month concurrent jail sentence for victim intimidation.

¶3 Postconviction, Zaruba moved the circuit court to modify his sentence because the court erroneously employed as a starting point the forty-year maximum sentence for second-degree sexual assault² and did not explain its reasons for the eleven-year sentence. The court denied the motion without a hearing.³ Zaruba appeals.

¶4 Sentencing is left to the circuit court's discretion, and we review whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The record must show that the court's

¹ All subsequent references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² The maximum penalty for this Class C felony is forty years and a \$100,000 fine. WIS. STAT. §§ 948.02(2) and 939.50(3)(c).

³ Zaruba does not challenge the nine-month jail sentence for victim intimidation.

discretionary decision had a “rational and explainable basis.” *Id.*, ¶76 (citation omitted). The court must specify the objectives of the sentence on the record and their importance. *Id.*, ¶¶40-41. The objectives include, but are not limited to, protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Id.*, ¶40. The court must also describe the facts relevant to the sentencing objectives and explain, in light of these facts, “why the particular component parts of the sentence imposed advance the specified objectives.” *Id.*, ¶42. The court must also identify sentencing factors and how those interact with the sentencing objectives. *Id.*, ¶43. The primary sentencing factors are the gravity of the offense, the character of the defendant, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, *review denied*, 2006 WI 39, 290 Wis. 2d 22, 712 N.W.2d 897. Finally, the exercise of sentencing discretion does not lend itself to mathematical precision. *Id.*, ¶25.

¶5 On appeal, Zaruba complains that the circuit court did not impose an individualized sentence. Zaruba zeroes in on the following remark by the circuit court as evidence of the court’s failure to fashion an individualized sentence:

The nature of the offense, my traditional place of starting, Mr. Zaruba, is with the maximum penalties that the legislature set up. The legislature dictates largely the “tone” of the law and the discretion that they entrust me and our judges in the sentencing field by setting the maximum and in this offense the maximum is 40 years in prison and a fine up to \$100,000 or both. There are very few crimes in our statutes that carry with them longer sentences.

¶6 Postconviction, the circuit court explained that the remark was “simply to give an objective starting point for what can be a penalty imposed based on legislative determination and categorization of the offense.”

Furthermore, it is clear from the transcript that the remark was made in the context of considering the gravity of the crime, a proper sentencing factor. *See id.*, ¶23.

¶7 The sentence in this case is a textbook example of an individualized sentence. The court considered the sentencing objectives and sentencing factors relevant to Zaruba in light of the facts available to the court at sentencing. The court considered the nature of the offense, Zaruba's character, background and rehabilitation needs, and the need to protect the public. With regard to the nature of the offense, the court noted that the legislature deemed the crime very serious as evidenced by the maximum penalty of forty years, Zaruba had various forms of intercourse with the fourteen-year-old victim on multiple occasions, and he told the victim not to tell anyone about the assaults. The court considered Zaruba's history of juvenile offenses and the fact that he was under supervision for prior offenses at the time of the assaults in this case. The court noted Zaruba's drug and alcohol use in connection with the assaults and other juvenile offenses. The court cited other instances of poor conduct, including an incident in a Huber facility in which Zaruba abused another resident in a manner the court deemed "disgusting." The court characterized Zaruba's criminal conduct as "escalating" and stressed the need to protect the public from Zaruba.

¶8 The court also discussed the impact on the victim of Zaruba's criminal conduct. The court acknowledged the presentence investigation report author's view that although Zaruba knew that his conduct was illegal, he did not care and was only concerned about getting caught. The presentence investigation report author opined that Zaruba was at high risk of reoffending and needed treatment in a confined setting.

¶9 The record reveals the circuit court's view that incarceration and supervision were necessary to meet the sentencing objectives of protecting the public and rehabilitating Zaruba. The court's sentencing rationale supports its individualized sentence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

